09-286

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~287.~~ 48

BERNHARD ARNSON AND ELLIS WILZINSKI, PLAINTIFFS IN ERROR,

vs.

THOMAS MURPHY, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 24, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 287.

BERNHARD ARNSON AND ELLIS WILZINSKI, PLAINTIFFS IN ERROR,

vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Bernhard Arnson and Ellis Wilzinski, plaintiffs, and Thomas Murphy, collector of the port of New York, defendant, a manifest error hath happened, to the great damage of the said Bernhard Arnson and Ellis Wilzinski, as is said and as appears by their complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaïd in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
April 30th, 1880.

SAM'L BLATCHFORD.

2 (Indorsed:) A 284. U. S. Supreme Court. Bernhard Arnson & ano., plaintiffs in error, against Thomas Murphy, collector of the port of New York, defendant in error. 5991. Writ of error. S. Kaufmann, plaintiffs' attorney, 39 Nassau street, N. Y. City.

U. S. circuit court. Filed May 4, 1880. John I. Davenport.

Due service of a copy of the within writ is hereby admitted.
Dated New York, May 4th, 1880.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby

certify that the following pages, numbered from four to thirty-five inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Bernhard Arnson and Ellis
3 Wilzinski, plaintiffs in error, against Thomas Murphy, collector of the port of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-first day of July, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

4 The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Thomas Murphy, defendant, by Bernard Arnson & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 27 day of September, 1879, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 25th day of Sept., in the year one thousand eight hundred and seventy-nine.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
Defendant's Attorney.

5 (Indorsed:) 5991. U. S. circuit court. Bernard Arnson & ano. vs. Thomas Murphy. Copy certiorari. Stewart L. Woodford, defendant's attorney.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Sept. 25, 1879.

Yours,

STEWART L. WOODFORD,
Defendant's Attorney.

To S. KAUFMAN,
Plaintiffs' Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, Sept. 25, 1879.

S. KAUFMAN,
Plaintiffs' Attorney.

N. Y. supreme court.

BERNHARD ARNSON & ANO.
vs.
THOMAS MURPHY, COLLECTOR OF THE PORT OF NEW YORK.

Description of merchandise.	Place from which imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Am't of duty exacted in excess.	Date of payment.	Date of protest.	Date of appeal.	Date of decision of Sec'y Treas.
Nitre benzole.....	Liverpool.....	The Queen.....	Feb'y 25, '71	M'ch 24, '71	127 80	April 26, '71	April 26, '71	June 13, '71	None received.
" "	"	Italy	M'ch 27, '71	April 19, '71	132	May 24, '71	May 23, '71	" "	
" "	"	Pennsylvania.....	" 10, '71	" 19, '71	132	June 13, '71	June 13, '71	" "	
" "	"	Italy	May 4, '71	May 23, '71	143	July 12, '71	July 12, '71	July 12, '71	
" "	"	Virginia.....	" 12, '71	June 5, '71	143 10	" 17, '71	" 17, '71	" 17, '71	
" "	"	Abyssinia.....	June 23, '71	July 17, '71	143 60	" "	" "	" "	
" "	"	Atlantic	July 7, '71	Aug. 1, '71	143 40	Aug. 1, '71	Aug. 1, '71	Aug. 1, '71	
" "	"	Aleppo	Feb'y 10, '71	M'ch 11, '71	130 20	July 31, '71	July 31, '71	July 31, '71	
" "	"	Atlantic	May 27, '71	June 22, '71	289 85	July 22, '71	July 22, '71	July 22, '71	
" "	"	Oceanic	Sept. 2, '71	Sept. 18, '71	129 50	Sept. 18, '71	Sept. 18, '71	Sept. 18, '71	
" "	"	England	" 26, '71	Oct. 23, '71	130 20	Nov. 29, '71	Nov. 29, '71	Nov. 29, '71	
					$1,644 65				

Please take notice that the foregoing is the bill of particulars herein.

S. KAUFMANN,
Plaintiffs' Attorney, 39 Nassau street, N. Y. City.

7 Supreme court, New York County.

BERNHARD ARNSON AND ELLIS WILZINSKI
vs.
THOMAS MURPHY, COLLECTOR OF THE PORT OF New York.

The plaintiffs, by Sigismund Kaufmann, their attorney, complaining of the defendant allege—

I. That at the time hereinafter mentioned they were and still are co-partners, doing business in the city of New York, under the firm name and style of Arnson & Wilzinski.

II. That at said times the defendant was collector of the port of New York, and at sundry times between the 25th April, 1871, and 30th November, 1871, at the city of New York, he received from plaintiffs herein the sum of one thousand six hundred and forty-four $\frac{65}{100}$ dollars
8 gold coin of the United States of America, to the use of the plaintiffs herein, which he promised thereupon to repay upon demand.

III. That thereafter and before this action the plaintiff duly demanded payment of said sum from defendant, but which defendant wholly refused to pay or any part thereof.

IV. That no part thereof has been paid and that there is now due to these plaintiffs from defendant the sum of one thousand six hundred and forty-four $\frac{65}{100}$ dollars gold, with interest on said sum from November 29th, 1871.

Wherefor' plaintiffs pray judgment against the defendant herein for the sum of one thousand six hundred and forty-four $\frac{65}{100}$ dollars gold,
9 with interest on said sum from November 29th, 1871, besides the costs of this action.

SIGISMUND KAUFMANN,
Plaintiffs' Attorney, Office & P. O. Address,
39 Nassau St., N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

Bernhard Arnson, being duly sworn, says that he is one of the plaintiffs herein; that the foregoing complaint is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BERNHARD ARNSON.

Sworn to before me this 20th day of June, 1879.

EDWARD STROUSE,
Notary Public, N. Y. Co.

(Endorsed:) N. Y. supreme court. Bernhard Arnson vs. Thomas
10 Murphy. Copy complaint. S. Kaufmann, pl'ffs' att'y, 39, Nassau st., N. City. Received Sep. 23, 1879. U. S. attorney's office.

11 United States circuit court, southern district of New York.

BERNARD ARNSON & ELLIS WILZINSKI
versus
THOMAS MURPHY, COLLECTOR, ETC.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and, in such official capacity, received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges, on information and belief, that any and all moneys received by him from plaintiffs at the times in said complaint mentioned, were paid by said plaintiffs as a debt due by them to the United States, and not otherwise, and were received by defendant by virtue of his office as said collector, and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith thereafter and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys, so received from plaintiffs, were the amounts due from them to the United States, according to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with duty, and no other sums than duties regularly assessed, and ascertained and liquidated according to law upon the plaintiff's import entry thereof, were collected or received by defendant from the plaintiffs.

III. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same and each thereof, and leaves the plaintiffs to make such proof thereof as they may be advised.

IV. For a separate and further defence, the defendant alleges that the cause or causes of action set forth in the complaint herein accrued to the said plaintiffs more than six years prior to the commencement of this action, and that therefore the same is or are barred by the New York statute of limitation in such case made and provided.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney for Defendant.

12 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Thomas Murphy, being duly sworn, says that he is the defendant above named; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

THOMAS MURPHY.

Sworn to before me this 25th day of September, 1879.

THOMAS GREENWOOD,
Notary Public, New York County.

(Indorsed:) 5991. U. S. circuit court, southern district of New York. Bernard Arnson & ano. vs. Thomas Murphy, collector, etc. Copy answer. Stewart L. Woodford, United States attorney, attorney for defendant.

Due service of a copy of the within copy answer is hereby admitted.

New York, October 4, 1879.

S. KAUFMANN,
Plaintiffs' Attorney.

To S. KAUFMANN,
Plaintiffs' Attorney.

13 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Friday, the twenty-third day of January, in the year of our Lord one thousand eight hundred and eighty.

Present, the honorable Nathaniel Shipman, circuit judge.

BERNARD ARNSON ET AL.
vs.
THOMAS MURPHY. } 5991.

On motion of Lewis Sanders, esq., of counsel for the plaintiffs in the above-entitled action, ordered trial.

Jurors sworn: Hugh W. Hunter, Samuel H. Russell, Richard F. Purdy, William Rhinelander, Lindley M. Ferris, jr., John W. Andreas, James M. Deuel, Andrew Campbell, Alfred S. Spaulding, Author C. Ely, Cornelius H. Delamater, Sigourney W. Fay.

Mr. Sanders opens the case on the part of the plaintiffs.

Evidence for the plaintiffs:

Bernard Arnson sworn.

14 A. B. Herrick, asst. U. S. att'y, of counsel for the defendant, moves that the court direct the jury to find a verdict for the defendant.

Evidence for the plaintiffs:

S. Kaufmann sworn.

Evidence for the defendant:

J. Dana Jones sworn.

Mr. Herrick renews the motion that the court direct the jury to find a verdict for the defendant, and is heard in support of said motion.

Mr. Sanders is heard in reply.

The court directs the jury to find a verdict for the defendant, subject to the revision of the court on questions of law.

The jury say that, by direction of the court they find a verdict for the defendant, subject to the revision of the court on questions of law; and so say they all.

15 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Thursday, the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and eighty.

Present, the honorable Nathaniel Shipman, circuit judge.

BERNARD ARNSON ET AL. *vs.* THOMAS MURPHY. } 5991.

Ordered that judgment be, and the same hereby is, entered for the defendant herein on the verdict rendered for said defendant on the 23d day of January, 1880.

16 *Judgment.*

United States circuit court, southern district of New York.

BERNARD ARNSON & ELLIS WILZINSKY *vs.* THOMAS MURPHY.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury, at a circuit court of the October term, 1879, and the issues having been tried, and a verdict for the defendant having been duly rendered on the twenty-third day of January, 1880, and his costs having been adjusted at $48.91:

Now, on motion of Stewart L. Woodford, United States attorney for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.91, his taxed costs, and have execution therefor.

Judgment signed this 19th day of March, 1880.

J. M. DEUEL,
Dep. Clerk.

17 (Indorsed:) 5991. United States circuit court. Bernard Arnson & Ellis Wilzinski vs. Thomas Murphy. Judgment roll. Stewrat L. Woodford, United States attorney, for defendant. Filed 187 . Costs, $48.91. U. S. circuit court. Filed Mar. 19th, 1880. John I. Davenport, clerk.

18 The circuit court of the United States for the southern district of New York.

BERNHARD ARNSON & ANO., PLAINTIFFS, *against* THOMAS MURPHY, COLLECTOR, &C., DEFENDANT.

This action was commenced in the supreme court of the State of New York on the 8th day of May, 1879.

The cause came on for trial before Judge Nathaniel Shipman, and a jury at a circuit court of the United States for the southern district of New York, on the 27th day of January, 1880.

The plaintiffs, to sustain the issues on their part, proved the importation at the times hereinafter stated of nitro-benzole by plaintiffs at the

19 port of New York from Liverpool, England; that the entry of said merchandize was made at the custom-house at New York, in due form of law, at the times and upon the invoices hereinafter mentioned.

That the collector of the port of New York imposed a duty upon said nitro-benzole at the rate of 50 per cent. ad valorem, as an essential oil not otherwise provided for, under sect. 5 of the act of July 14th, 1862; that plaintiffs, under protest, paid said duty to the defendant as collector of the port of New York upon said importations at said rates, claiming that nitro-benzole was only liable to a duty of forty cents per gallon.

That the said duties so paid were each and every of them paid under protest.

That plaintiff duly protested in writing against the exaction of
20 said duty at the dates hereinafter mentioned, claiming that duty at 50 per cent. ad valorem was erroneous, and that the lawful duty was but 40 cents per gallon, as nitro-benzole is a non-enumerated article, and as such non-enumerated article is liable only to the highest rate of duty imposed upon either of its component parts, agreeably to the similitude clause of the act of Aug. 30th, 1842, section 2499 of the U. S. Revised Stat'es.

That on the same days respectively plaintiffs duly appealed to the Secretary of the Treasury of the United States from said decision of the defendant's exacting said amounts as duty.

That the amount of duty claimed to have been exacted in excess on such importations is the sum of $1,644.65.

Plaintiffs also proved that said nitro-benzole was only liable to
21 a duty of forty cents per gallon, instead of 50 per cent. ad valorem; that more than seven years elapsed from the date of each and every of said appeals before the bringing of this action, and no decision of the Secretary of the Treasury appeared ever to have been made on any of said appeals.

It was agreed by the counsel for the respective parties, that if plaintiffs were entitled to recover anything, that then the amount should be assessed before the proper officer at the custom-house and entered in the judgment.

The dates of the invoices and entries of said nitro-benzole at the port of New York, and of the payments of duties thereon, the amounts claimed to have been paid in excess of the lawful duty, the dates of pro-
22 tests and appeals, are correctly set out in the following schedule hereto annexed and marked Exhibit A.

EXHIBIT A.

Bill of particulars.—Arnson & Wilzinsky, importers.

N. Y. supreme court.

BERNHARD ARNSON & ANO.
vs.
THOMAS MURPHY, COLLECTOR OF THE PORT OF NEW YORK.

Description of merchandise.	Place from which imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Am't of duty exacted in excess.	Date of payment.	Date of protest.	Date of appeal.	Date of decision of Sec'y Treas.
Nitro-be'zole	Liverpool	The Queen	Feb'y 25, '71	Mc'h 24, '71	$127 80	April 26, '71	April 26, '71	June 13, '71	
" "	"	Italy	M'ch 27, '71	Ap'l 19, '71	$132	May 24, '71	May 23, '71	" "	
" "	"	Pennsylvania	" 10, '71	" 10, '71	132	June 13, '71	June 13, '71	" "	
" "	"	Italy	May 4, '71	May 23, '71	143	July 12, '71	July 12, '71	July 12, '71	
" "	"	Virginia	" 12, '71	June 5, '71	143 10	" 17, '71	" "	" 17, '71	
" "	"	Abyssinia	June 23, '71	July 17, '71	143 60	" "	" "	" "	None received.
" "	"	Atlantic	July 7, '71	Aug. 1, '71	143 40	Aug. 1, '71	Aug. 1, '71	Aug. 1, '71	
" "	"	Aleppo	Feb'y 10, '71	M'ch 11, '71	130 20	July 31, '71	July 31, '71	July 31, '71	
" "	"	Atlantic	May 27, '71	June 22, '71	289 85	July 22, '71	July 22, '71	July 22, '71	
" "	"	Oceanic	Sept. 2, '71	Sept. 18, '71	129 50	Sept. 18, '71	Sept. 18, '81	Sept. 18, '71	
	"	England	" 26, '71	Oct. 23, '71	130 20	Nov. 29, '71	Nov. 29, '71	Nov. 29, '71	
					$1,644 65				

Please take notice that the foregoing is the bill of particulars herein.

S. KAUFMANN,
Plaintiffs' Attorney, 39 Nassau street, N. Y. City.

Paintiffs then rested.

The defendant pleaded in bar of this action, besides other defences, that the cause of action sued upon did not accrue within six years before the commencement thereof, and that the same was barred by the statute of limitations of the State of New York.

The times of payment of duties and of the appeals had been already proved as stated in Schedule A. The statute of limitations of the State of New York, or so much thereof as is claimed to be applicable to this case, is as follows:

"§ 73. The provisions contained in the chapter of the Revised Statutes, entitled 'Of actions and the times of commencing them,' are
24 repealed; and the provisions of this title are substituted in their stead. This title shall not extend to actions already commenced, or to cases where the right of action has already accrued, but the statutes now in force shall be applicable to such cases according to the subject of the action, and without regard to the form.

"§ 74. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute and in the cases mentioned in section seventy-three. But the objection that the action was not commenced within the time limited can only be taken by answer.

"§ 89. The periods prescribed in section 74 for the commence-
25 ment of actions other than for the recovery of real property shall be as follows:

"§ 90. Within twenty years:

"1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

"2. An action upon a sealed instrument.

"§ 91. Within six years:

"1. An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in section 90."

The foregoing provisions were in the statute of limitations of the State of New York, passed prior to, and in force at, the various times specified in Schedule A, and at the time of the commencement of this action, as found in vol. 2 of the New York revised statutes, part III, title II, chap's I & III.

The defendant had no other testimony, and rested.

26 The defendant thereupon moved the court to direct a verdict in favor of the defendant, which motion the court granted, and thereupon the plaintiffs duly excepted.

And inasmuch as the matter aforesaid do not appear upon the record, the plaintiff's counsel here caused this bill of exceptions to be made, and the same was duly settled as of the 27th day of January, 1880, the day the said verdict was rendered, and of the October term of said court for 1879.

(S'g'd) N. SHIPMAN, *Judge.*

Correct.

STEWART L. WOODFORD,
U. S. Att'y, for Def't.

S. KAUFMANN,
Pl'ffs' Att'y.

(Endorsed:) U. S. circuit court. Bernard Arnson & ano. vs. Thomas Murphy, collector, &c. Bill of exceptions as settled. S. Kaufmann, pl'ffs' att'y, 39 Nassau st., N. Y. City. U. S. circuit court. Filed Mar. 4, 1880. John I. Davenport, clerk.

27 *Assignment of error.*

U. S. Supreme Court, Washington, D. C.

BERNHARD ARNSON & ANO., PLAINTIFFS IN error,
vs.
THOMAS MURPHY, COLLECTOR OF THE PORT of New York, defendant in error.

Of October term, 1879.

Afterwards, to wit, on the 3d Monday of October, 1879, in the said term, before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, came the said plaintiffs in error, by Sigismund Kaufmann, their attorney, and says that on the records and proceedings aforesaid there is manifest error in this, to wit, that the court ordered a verdict and judgment for defendant and against
28 plaintiffs, adjudging that the six-year statute of limitation of the State of New York was a bar to this action, whereas the said court should have adjudged that only the limitation set up in the statutes of the United States should be allowed, and that said limitation had not yet expired.

And this they, Bernhard Arnson and Ellis Wilzinski, by their attorney, are ready to verify.

Wherefore they pray that the judgment aforesaid for the errors may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things they have lost by occasion of the judgment aforesaid.

SIGISMUND KAUFMANN,
Pl'ffs' Att'y.

(Endorsed:) U. S. Supreme Court. Bernhard Arnson & al., pl'ffs in error, vs. Thomas Murphy, collector, &c., def't in error. Assignment
29 of error. S. Kaufmann, pl'ffs' att'y, 39 Nassau st., N. Y. City.

Due service of a copy of the within assignment of error is hereby admitted.

Dated N. Y., May 4th, 1880.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

U. S. circuit court. Filed May 4th, 1880. John I. Davenport, clerk.

30 *Joinder in error.*

Supreme Court of the United States.

BERNARD ARNSON AND ELLIS WILZINSKI, plaintiffs in error,
ag'st
THOMAS MURPHY, COLLECTOR OF CUSTOMS AT the port of New York, defendant in error.

And afterwards, to wit, on the second Monday of October, 1880, the

said Thomas Murphy, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid.

And he prays that the said Supreme Court before the justices thereof now here, may proceed to examine as well the records and proceedings aforesaid as the matters aforesaid above assigned for error, and that
31 the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c., &c.

STEWART L. WOODFORD,
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the United States. Bernard Arnson and Ellis Wilzinski, plaintiffs in error, ag'st Thomas Murphy, collector of customs at the port of New York, defendant in error. Joinder in error.

U. S. circuit court. Filed May 5th, 1880. John I. Davenport, clerk.

32 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

BERNHARD ARNSON & ELLIS WILZINSKI, PL'FFS,
vs.
THOMAS MURPHY, COLLECTOR OF THE PORT OF New York, def't.

Know all men by these presents that we, Sigismund Kaufmann, of the city of Brooklyn, county of Kings and State of New York, and Louis A. Wagner, of the same place, are held and firmly bound unto the above named Thomas Murphy, collector of the port of New York, in the sum of two hundred and fifty dollars, to be paid to the said Thomas Murphy, collector, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the twelfth day of April, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named Bernhard Arnson & Ellis Wilzinski have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above named Bernhard Arnson & Ellis Wilzinski shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SIGISMUND KAUFMANN. [L. S.]
LOUIS A. WAGNER. [L. S.]

Sealed and delivered, and taken and acknowledged, this 12th day of April, 1880, before me.

EDWARD STROUSE,
Notary Public, N. Y. Co.

33 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Sigismund Kaufmann and Louis A. Wagner, being severally duly sworn, depose and say each for himself as follows: that he is worth the sum of two hundred and fifty dollars over and above all his just debts and liabilities.

SIGISMUND KAUFMANN.
LOUIS A. WAGNER.

Sworn to this twelfth day of April, A. D. 1880, before me.
EDWARD STROUSE,
Notary Public, N. Y. Co.

The foregoing bond is approved.
April 30th, 1880.

SAM'L BLATCHFORD.

(Indorsed:) U. S. circuit court. Bernhard Arnson and ano., pl'ffs, vs. Thomas Murphy, collector of the port of New York, def't. Bond for damages and costs on appeal. S. Kaufmann, pl'ffs proctor, 39 Nassau st., N. Y. City. U. S. circuit court. Filed May 4th, 1880. John I. Davenport, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Thomas Murphy, collector, &c., defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Bernhard Arnson & ano. are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated, New York, May 4th, 1880.

SAM'L BLATCHFORD,
Circuit Judge.

35 (Indorsed:) A 284. U. S. Supreme Court. Bernhard Arnson & ano., pl'ffs in error, vs. Thomas Murphy, collector, &c., def't in error. 5591. Citation. S. Kaufmann, att'y for pl'ffs, 39 Nassua st., N. Y. City.

U. S. circuit court. Filed May 4, 1880. John I. Davenport, clerk.

Due service of a copy of the within citation is admitted.

Dated, New York, May 4th, 1880.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

(Indorsement on cover:) No. 287. Bernhard Arnson and Ellis Wilzinski, plaintiffs in error, vs. Thomas Murphy, collector of the port of New York. S. New York C. C. U. S. Filed 29th September, 1880.

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109-287

SUPREME COURT U.S.
FILED
APR 3 1893
JAMES H. McKENNEY, CLERK

THE SUPREME COURT OF THE UNITED STATES.

No. 287. 1/8

BERNHARD ARNSON AND ELLIS WILZINSKI,

Plaintiffs in Error,

against

THOMAS MURPHY, COLLECTOR OF THE PORT OF NEW YORK,

Defendant in Error.

BRIEF AND POINTS FOR PLAINTIFFS IN ERROR.

LEWIS SANDERS,

Counsel for Plaintiffs in Error.

BURGOYNE, Law Case Printer (Law Telephone 587), 57, 59 & 61 Park Street, N. Y.

SUPREME COURT OF THE UNITED STATES.

BERNHARD ARNSON and ELLIS WILZINSKI,
Plaintiffs in Error,

AGAINST

THOMAS MURPHY, Collector of the Port of New York,
Defendant in Error.

STATEMENT.

Plaintiffs, importers of nitro-benzole, sue to recover $1,644.65, the difference between the correct duty thereon of 40 cents per gallon, and the amount unlawfully exacted, viz., 50 per centum *ad valorem* as an essential oil. Suits for the amount herein sought to be recovered were pending in the Circuit Court when this Court affirmed the judgment in ~~Arthur~~ vs. Arnson, sustaining the decision of the Court below, that nitro-benzole was not an essential oil, and was therefore liable only to a duty of 40 cents per gallon. Thereupon the Secretary of the Treasury instructed the Collector of the Port of New York that if plaintiff would discontinue those suits and pay the costs the amounts claimed would be adjusted and paid. This the plaintiffs did, but the Collector rejected the claims in suit because suit had been begun before the lapse of ninety days from the date of appeal without a decision thereon by

Murphy
96 U.S. 131

the Secretary of the Treasury. Whereupon plaintiffs brought this suit, and the defendant pleaded that the cause or causes of action set forth in the complaint accrued more than six years prior to the commencement of this action, and that therefore the same is or are barred by the New York Statute of Limitations in such case made and provided (fol. 11, p. 5).

It is conceded that if the Statute of Limitations had begun to run and the laws of New York apply then the defense is made out, but both propositions are denied.

The plaintiffs proved the importation of the nitrobenzole, the entry thereof, the imposition of duty thereon by the defendant as Collector of the Port of New York at 50 % *ad valorem* as an essential oil, due protest "in writing against the exaction of said duty;" due appeal "to the Secretary of the Treasary from defendant's decision exacting said duty;" that no decision upon any of said appeals had been rendered by the Secretary; that the true rate of duty was forty cents per gallon and the excess paid was $1,644.65 (pp. 7 and 8).

The Court sustained the defense of the limitation of six years imposed by the general Statute of New York and directed judgment for defendant. Plaintiffs duly excepted (fol. 26, p. 10).

Assignment of Errors.

The Court below erred, first, in holding that the Statute of Limitations began to run before the decision of the Secretary of the Treasury upon the appeal to him; and second, in holding that the Statute of Limitations of any of the several States of the Union, are or can be grafted upon those of the United States.

POINTS.

I. *The statute of the United States, prescribing the various steps to be taken by an importer to enable him to recover the amount of excessive duties paid, is imperative and exclusive.*

THE CONSTITUTIONAL ACTION OF CONGRESS ON A SUBJECT EXCLUDES ALL AUXILIARY OR SUPPLEMENTAL STATE ACTION THEREUPON.

In Hall vs. DeCuir, 95 U. S., 498-9, held: "The "legislation of Congress, if constitutional, must "supersede all State legislation upon the same" (subject) "and by necesary implication prohibit it, ex- "cept in cases where the legislation of Congress "*manifests an intention* to leave some particular "matter to be regulated by the several States. "*Cooley vs. Board of Port Wardens, supra.* De- "cisive authority for that proposition is found in "the unquestioned decisions of this Court. Such "were the views of Judge Story more than thirty- "five years ago, when he said: If Congress have a "constitutional power to regulate a particular sub- "ject, and *they do actually regulate it in a given "manner, and in a certain form, it cannot be that "the State Legislatures have a right to interfere, "and, as it were, by way of complement to the legis- "lation of Congress, to prescribe additional regu- "lations and what they may deem auxiliary pro- "visions for the same purpose* (The Chusan, 2 Story, "466; Sinnott vs. Davenport, 22 How., 277).

"In such a case the legislation of Congress, in "what it does prescribe, manifestly indicates that "it does not intend that there shall be any further "legislation to act upon the subject matter. Its "silence as to what it does not do is as expressive "of what its intention is as the direct provisions "made by it (Prigg vs. Pennsylvania, 16 Pet., 539; "Gibbons vs. Ogden, *supra;* White's Bank vs. "Smith, *supra.*"

To hold the contrary is to say, that in addition to the Statute of the United States, both the importer and the collector are subject to the provisions of the particular or general laws of that State in which the action happens to be brought, and that the Legislature of each State may change such laws at will. Even if the application of the State laws be confined to the particular omission which the Judge of the State or Federal tribunal, before whom the cause is tried, discovers or imagines to exist in the Federal statute, the evil of many laws enacted by different authorities, covering the same rights, would still subsist, and be rather fostered than checked by opening the field of speculation as to any possible hiatus in the Federal law.

§ 2931 R. S., provides that on the entry of any merchandise the decision of the Collector of the Port of the rate and amount of duty thereon shall be final and conclusive unless the owner shall within ten days after the ascertainment and liquidation of the duties give notice to the Collector in writing of the grounds of his dissatisfaction with such decision, and appeal therefrom within thirty days to the Secretary of the Treasury. The decision of the Secretary upon appeal shall be final and conclusive "unless suit shall be brought within ninety days "after the decision of the Secretary of the Treasury "on such appeal."

"No suit shall be maintained in any Court for "the recovery of any duties alleged to have been "erroneously or illegally exacted until the decision "of the Secretary of the Treasury shall have been "first had on such appeal, unless the decision of "the Secretary shall be delayed more than ninety "days from the date of such appeal."

§ 3010 R. S., provides that all duties paid under protest shall be placed to the credit of the Treasurer of the United States and shall not be held by the Collector to abide the event of suit for their recovery.

§ 3012½ R. S., provides for a refund without suit

of duties illegally exacted where there has been due protest and appeal.

It will be observed that the Federal Statute prohibits any suit at all until the importer has, 1st, protested in writing against the Collector's decision; and, 2d, appealed therefrom to the Secretary of the Treasury; and, 3d, awaited his decision thereon ninety days—in short, the whole subject of litigation—of even the bare right to litigate—has been taken within Federal control as involving United States revenue.

Not only is the right to initiate litigation controlled, but there are three short statutes of limitations: 1st. Ten days to protest against the Collector's decision; 2d. Thirty days in which to appeal to the Secretary of the Treasury; and 3d. Ninety days after such decision in which to sue.

Here are three separate limitations and a failure to comply with any one of them is fatal—a bar to suit.

The Court below, not content with these, has added a fourth, and has said that where the Secretary of the Treasury omits to decide the appeal, and Congress has failed to provide for such omission of duty, by one of the chief officers of the Government, that it intended the laws of any State in which the action might be brought should apply, and that there should be thirty-eight laws of as many legislative bodies, controling a purely federal subject. It is manifest that this strange and incongruous procedure cannot receive the sanction of this Court unless some act of Congress or some imperative rule of law demands it. The acts of Congress demonstrate that it intended to take entire and exclusive jurisdiction over the subject—as a matter solely affecting the general Government, and that it was not intended that the States should have the power to shorten or lengthen the time in which such actions might be begun.

The statute properly construed, reads: "Suit *may* " be brought at any time after the expiration of

" ninety days from the date of appeal to the Secre-
" tary of Treasury, and *shall* be brought within
" ninety days from his decision on said appeal."

The *alpha* and *omega* of action are here prescribed, the boundaries of time within which an action shall be brought.

Suppose that the Secretary of the Treasury chooses to withhold his decision upon an appeal until a test case has been tried, as here, and the importer having succeeded at the Circuit in the test suit, concludes to defer other actions until the decision of this Court upon appeal, and when that is had affirming the decision below, the State statute has run, as here, and the Secretary should then, as was his plain duty here, reverse the decision of the collector on the pending appeals, what statute would apply, State or Federal?

By the State law the action is barred; by the Federal law the importer has ninety days in which to sue. This shows a plain conflict of laws, and so there would be if the State law attempted to limit the time to sixty days.

The State statute begins to run from a fixed period; the Federal statute from the date of the Secretary's decision. The cause of action accrues on the payment of illegal duties. The right to sue does not accrue until after appeal to the Secretary and his decision or omission to decide for ninety days. Thus the six years statute might have been running for a year or more when the decision of the Secretary would set the short statute of ninety days running. When both are running which shall prevail?

II. *But the statute had not begun to run.*

It is respectfully submitted that this Court decided this point in favor of the plaintiffs when it affirmed the doctrine, that where the law requires some act to be performed by an officer of the Gov-

ernment before the statute begins to run, that the time when such officer might have performed the omitted duty could not be substituted for its performance, and thus set the statute running.

Especially must this be true of the *quasi* judicial decisions of the Secretary of the Treasury, which are by statute rendered final and conclusive unless suit be brought within ninety days therefrom, and are by law final and conclusive as against himself or his successor. If the Secretary decides in favor of the importer, there is an end. No suit is necessary, or plaintiff may then sue in the Court of Claims within two years. A party who, having faith in his claim, chooses to await the decision of the Secretary with, as here, a judgment on the merits in his favor in another case on the same point, should be able to do so without searching the laws of the State to find out what general actions are barred by its laws.

The reasons why this Court held that the Statute of Limitations which applies to actions in general in the Court of Claims, of six years, did not apply to Clark's action, have direct relation to the differences we have noticed between that case and this. The Court there held that until the accounting officers had refused to allow the claim in his accounts, there was no occasion to establish it in the Court of Claims.

U. S. vs. Smith, 105 U. S., 621.

III. The principle upon which the defense rests is disclosed to be fallicious by the application of various tests.

Suppose that the Legislature of the State of New York should pass a law limiting all actions against collectors of the United States customs to two months from the date of appeal to the Secretary of the Treasury would this Court hold the law valid? Certainly not. Where does a general State law, not de-

signed to affect suits against Federal officers, obtain greater force or efficacy than a law specially designed to affect that object.

Again, suppose the Federal statute to be a State law the result is the same, for the rule is well settled that special regulations upon a particular subject withdraw that subject from the general act, unless in terms made subject to the general law.

Again, suppose the general State Statute of Limitations to be a Federal statute, the same rule applies, the special statute is the sole rule of action within the limits prescribed and over the subject matter defined—unless the general law shall be expressly made to apply.

IV. The judgment should be reversed with costs.

LEWIS SANDERS,
Counsel for Plaintiffs in Error.

104-22

FILED
OCT 12 1883

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

ARNSON, &c.,
v.
MURPHY, COLLECTOR. } No. 48.

BRIEF FOR THE UNITED STATES.

4759

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Again, suppose the general State Statute of Limitations to be a Federal statute, the same rule applies, the special statute is the sole rule of action within the limits prescribed and over the subject matter defined—unless the general law shall be expressly made to apply.

IV. The judgment should be reversed with costs.

LEWIS SANDERS,
Counsel for Plaintiffs in Error.

104-286

OFFICE SUPREME COURT, U.S.
FILED
OCT 12 1883
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

ARNSON, &c.,
v.
MURPHY, COLLECTOR. } No. 48.

BRIEF FOR THE UNITED STATES.

4759

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

ARNSON, &c.,
v.
MURPHY, COLLECTOR. } No. 48.

BRIEF FOR THE UNITED STATES.

This is an action to recover excessive duties paid upon *nitro benzole*.

The defendant relied upon a plea of the statute of limitations of the State of New York.

The case is stated upon the record, pp. 7, &c., and the statute relied upon is given on page 10.

It appears that the suit was brought at a time more than seven years after the last of the various appeals from the collector to the Secretary of the Treasury. The time allowed by the State statute is six years.

The court directed the jury to find for the defendant, and the importer has brought the case into this court.

The point upon which the plaintiff relies for *error* is that State statutes of limitations do not apply to suits to recover duties wrongfully exacted by collectors, for the reason that they are superseded by the special require-